SOME LEGAL ASPECTS OF THE VISIT OF PRESIDENT WILSON TO PARIS

PRIOR to President Wilson's first trip to attend the Peace Conference of Paris, doubts on constitutional grounds as to the legality of such action on the part of a President of the United States were suggested.[1]

An examination of some of the questions raised by such doubts may be of interest for the future.

In December 1918,[2] the United States was at war with Germany;[3] an armistice with Germany had been signed and had gone into force on November 11, 1918, but by its terms that armistice was temporary in character, lasting only thirty-six days, and its first renewal, of December 13, 1918, was for a further duration of one month only.[4]

At the period in question, a resumption of hostilities in Europe was not generally regarded as impossible;[5] the fighting had ceased, but it was by no means certain that it would not be resumed; some two million American troops were abroad, mostly in France; our forces and those of the Allies were, under the terms of the Armistice, in occupation of enemy territory; and our navy was in large part in foreign waters more or less adjacent to the regions of the then recent hostilities.

All of these circumstances, and others, are of course to be

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[1] See Article by "An Eminent Jurist" in N. Y. TIMES, Nov. 26, 1918; 14 : 5.

[2] President Wilson sailed for Paris on December 4, 1918.

[3] Discussion of the then status with Austria-Hungary is omitted as unnecessary.

[4] For text of the Armistice and its renewals see "Terms of the Armistices concluded between the Allied Governments and the Governments of Germany, Austria, Hungary and Turkey." GREAT BRITAIN, PARLIAMENTARY PAPERS, 1919, (Cmd. 53).

[5] See statement of Maj. Gen. Sir Frederick B. Maurice, N. Y. TIMES, Nov. 13, 1918; 4 : 4; also general statement that occupation forces were prepared to reorganize instantly into battle formation, in case anything went amiss with the Armistice. N. Y. TIMES, Nov. 17, 1918; 1 : 8.

considered in any constitutional discussion of the questions involved in our subject.

Some thought should first be given to the functions, or in other words, to the powers and duties of the President, both generally and in the particular circumstances discussed.

Sufficiently for present purposes the functions of the President under the Constitution may be discussed as those

a. Executive in a limited sense,

b. Having to do with foreign affairs,

c. As Commander-in-Chief of the Army and Navy,

d. Pertaining to legislation.

All of these are granted, or more properly, are imposed on the President by the Constitution, and it is elementary that their *nature* cannot be changed or affected by Congress. This is not to say that their scope, or what may be called their field of exercise, may not be enlarged by statute or otherwise; for obviously such is the case. The duty of the President to see that the laws are faithfully executed may be increased in its extent by the passage of statutes relating to new subjects of legislation; various kinds of statutes may make desirable the negotiation of treaties, and war declared by Congress brings into play the highest functions of the Commander-in-Chief; but the *quality* of the Presidential powers is fixed by the Constitution itself and can be changed only by a change in that instrument.

The relevant provisions of the Constitution are set forth in the margin.[6]

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[6] ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected as follows.

(The provisions as to the method of election and as to elegibility to office are here omitted.)

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

(Provisions as to Compensation are omitted.)

The general language of the Constitution as to the vesting of "executive Power" is simple and comprehensive.

"The executive Power shall be vested in a President of the United States of America."

Following this general grant of power, are specified provisions relating to the President as Commander-in-Chief and to the power of making treaties (both of which will be separately discussed), and also specific provisions as to requiring opinions from officers in executive departments, reprieves and pardons, appointments, information and recommendations to Congress, convening and adjourning of the Houses of Congress, reception of ambassadors and ministers, seeing to the execution of the laws, commissions of officers of the United States.

How far, if at all, the vesting of the executive power in the

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Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect as to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

(*Section* 4 as to impeachment of various officers is here omitted.)

President by the general words above quoted, is limited by any or all of the specific provisions mentioned, is a question upon which difference of opinion has always existed.

It is in a way extraordinary and at the same time satisfactory from the point of view of the student that the two views of the question have been upheld with clarity and precision by two recent occupants of the presidential office.

Mr. Roosevelt put forth with characteristic vigor what may be called the positive view of the functions of the President, which, as he says, he consistently followed while in office:

"I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. . . .

"As to all action of this kind there have long been two schools of political thought, upheld with equal sincerity. The division has not normally been along political, but temperamental lines. The course I followed, of regarding the executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service, was substantially the course followed by both Andrew Jackson and Abraham Lincoln. Other honorable and well-meaning Presidents, such as James Buchanan, took the opposite and, as it seems to me, narrowly legalistic view that the President is the servant of Congress rather than of the people, and can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action." [7]

The opposite and more legalistic view of Mr. Taft is of exceptional interest because of his present position as Chief Justice of the United States:

[7] ROOSEVELT, AUTOBIOGRAPHY, 389, 394, 395.

"The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest, and there is nothing in the Neagle case and its definition of a law of the United States, or in other precedents, warranting such an inference. The grants of Executive power are necessarily in general terms in order not to embarass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist." [8]

Strangery enough, the entrance of America into the World War and the conduct of the War itself, did not bring about any situation requiring serious discussion of the constitutional extent of executive authority as such.[9] Mr. Wilson exercised enormous powers during the War, powers vastly greater than those previously exercised by any other President; but with nearly literal truth it may be said that they were powers almost wholly granted to him by Congress;[10] and the question as

[8] TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 139–140.

[9] "Thus, while President Wilson undoubtedly exercised a vastly greater power during the recent World War than did President Lincoln during the Civil War, he was careful to consult with Congress almost continuously during the war, and to secure express authority from that body in almost every case where there might be any doubts as to his own power to act without such authority; while President Lincoln, in cases of doubtful authority and even of undoubted lack of authority, such as increasing the regular armed forces, suspending the writ of habeas corpus, and issuing the emancipation proclamation, usually acted first and secured the sanction of law afterwards, if at all." C. A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES, 268.

[10] See Eugene Wambaugh, "War Emergency Legislation — a General View," 30 HARV. L. REV. 663; Charles G. Fenwick, "Democracy and Efficient Government," 14 AM. POL. SCI. REV. 565; and generally the War Legislation of 1917–1918, 40 STAT. AT L.

A large number of statutes which may be regarded as war legislation were passed during this period. Some of the most important are the following:

Authorization of taking over of enemy vessels, May 12, 1917, *ibid.*, 75;
Selective Draft Act, May 18, 1917, *ibid.*, 76;
Espionage Act, June 15, 1917, *ibid.*, 217;

to how far he might have exercised such powers without congressional grant, did not arise.[11]

Act to punish obstructing transportation and establishing priorities, Aug. 10, 1917, *ibid.*, 272;

Act authorizing control of food and fuel, August 10, 1917, *ibid.*, 276;

Second Liberty Loan Act, Sept. 24, 1917, *ibid.*, 288;

Act creating an Aircraft Board, Oct. 1, 1917, *ibid.*, 296;

War Revenue Act, Oct. 3, 1917, *ibid.*, 300;

Act permitting foreign vessels in coastwise trade, Oct. 6, 1917, *ibid.*, 392;

Act to prevent the publication of certain inventions, Oct. 6, 1917, *ibid.*, 394;

War Risk Insurance Act, Oct. 6, 1917, *ibid.*, 398;

Trading with the Enemy Act, Oct. 6, 1917, *ibid.*, 411;

Act to provide housing for fleet workers, March 1, 1918, *ibid.*, 438;

Act to protect the civil rights of persons in military and naval establishments, March 8, 1918, *ibid.*, 440;

Daylight saving law, March 19, 1918, *ibid.*, 450;

Act to authorize control of transportation systems, March 21, 1918, *ibid.* 451;

War Finance Corporation Act, April 5, 1918, *ibid.*, 506;

Resolution changing apportionment of draft, May 16, 1918, *ibid.*, 554;

Resolution extending draft provisions, May 20, 1918, *ibid.*, 557;

Overman Act, May 20, 1918, *ibid.*, 556;

Foreign travel restrictions act, May 22, 1918, *ibid.*, 559;

Joint resolution to prevent rent profiteering in the District of Columbia, May 31, 1918, *ibid.*, 593;

Vocational rehabilitation act, June 27, 1918, *ibid.*, 617;

Fourth Liberty Bond Act, July 9, 1918, *ibid.*, 844;

Shipping Act, 1916, amendments, July 15, 1918, *ibid.*, 900;

Joint resolution for federal control of telegraph, telephone, etc. systems, July 16, 1918, *ibid.*, 904;

Army emergency increase act, Aug. 31, 1918, *ibid.*, 955;

Joint resolution establishing prohibitory liquor zones, Sept. 12, 1918, *ibid.*, 958;

Supplement to Second Liberty Bond Act, Sept. 24, 1918, *ibid.*, 965;

Food stimulation act, Nov. 21, 1918, *ibid.*, 1045.

[11] By way of contrast one may recall the violent outgivings caused by the issuance by Lincoln of the Emancipation Proclamation. See CONGRESSIONAL GLOBE, 2nd Sess., 37th Cong., December 11, 1862, p. 76; and some of the pamphlets of the period; Benjamin Robbins Curtis, *Executive Power;* Grosvenor P. Lowery, *The Commander-in-Chief, a Defence upon Legal Grounds of the Proclamation of Emancipation, and an answer to ex-Judge Curtis' pamphlet entitled "Executive Power";* Charles P. Kirkland, *A Letter to the Hon. Benjamin R. Curtis, late Judge of the Supreme Court of the United States, in review of his recently published pamphlet on the "Emancipation Proclamation" of the President;* Charles Cooper Nott, *The Coming Contraband, a reason against the Emancipation Proclamation not given by Mr. Justice Curtis;* MAGAZINE OF HISTORY WITH NOTES AND QUERIES, Extra No. 49. See also BERDAHL, *op. cit.*, 110.

In any event and under any theory, the powers of the executive, even in times of peace, are very extensive and far reaching.[12]

More important here than the precise extent of the executive powers is the fact that all of these powers, whether granted generally or specifically by the Constitution (with the possible exception of the power to "Commission all the officers of the United States") require inherently and essentially the exercise of executive discretion as to the fact, the time and the manner of their exercise. This is indeed so obvious as hardly to require mention, except to show that any limitation as to the *place* of their exercise, would in itself interfere with the necessary discretion of the executive and therefore cannot be inferred and cannot exist, in the absence of other constitutional provisions bearing on the subject.

One provision of the Constitution which might seem to have some relation to this subject is that providing for the establishment of a seat of government. This provision is contained in Article 1, Section 8 of the Constitution as follows:

"The Congress shall have Power . . . to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings."

The subject of this provision was not much debated in the Constitutional Convention. There appears to have been no discussion as to the effect of the establishment of a seat of government in its relation to the executive.

There seems to have been a concurrence of opinion in the Constitutional Convention that the seat of government should not be located at a state capital, nor at any large city, although

[12] Judicial discussion of the extent of the purely executive powers is infrequent. See however, the remarks of the Supreme Court in the case of *In re* Neagle, 135 U. S. 1, 63–67 (1889).

Mr. Morris mentioned that both Philadelphia and New York had expectations of becoming the seat of Government.[13]

The journal of the Convention shows that on August 18, 1787, among the additional powers proposed to be vested in the legislature of the United States and referred to Committee was the following: "to fix and permanently establish the seat of Government of the United States in which they shall possess the exclusive right of soil and jurisdiction," [14] and other language proposed by Mr. Madison, according to his journal, was as follows:

"To exercise exclusively Legislative authority at the seat of the General Government, and over a district around the same not exceeding ——— square miles; the Consent of the Legislature of the State or States comprising the same, being first obtained." [15]

It will be observed that this language differs only in form from the provision finally adopted.

As reported by the Committee of Eleven,[16] and as referred to the Committee of Style,[17] the text is only verbally different from the provision which was reported in exactly the language of the Constitution.[18]

Obviously the provision for the creation of a district which should be the seat of the goverment could not be immediately carried into effect, and the Congress (under the Articles of Confederation) fixed upon New York as the place where the first Congress under the Constitution should meet, and where the first President of the United States under the Constitution should be inaugurated.[19]

Accordingly the Senate and House of Representatives were convened in New York on March 4, 1789, where on

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[13] 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION, 127.

[14] *Ibid.*, II, 321, 322.

[15] *Ibid.*, II, 321, 325.

[16] *Ibid.*, II, 509.

[17] *Ibid.*, II, 570.

[18] *Ibid.*, II, 595, 596.

[19] The resolution was passed on Sept. 13, 1788, as follows:

"RESOLVED: — That the first Wednesday in January next be the day for appointing the electors in the several states, which before the said day shall have ratified the said constitution; and the first Wednesday in February next, be the day for the electors to assemble in their respective states, and

April 30, 1789, George Washington was inaugurated as the first President.[20]

It is of some interest to observe that while President Washington dated his first messages to the Senate at New York, as for example, the first special message, which is dated "New York, May 25, 1789," [21] this style was soon abandoned by him, as four messages later in the same year are dated as follows: "United States, September 29, 1789." [22] This latter style seems to have been generally followed by Washington and Adams, though perhaps not in every instance by the latter.[23]

By the act of July 16, 1790,[24] Congress provided for the temporary establishment of the seat of Government at Philadelphia and for its removal thence in 1800 to what is now the District of Columbia.

Pursuant to this Act, the seat of government was removed to Philadelphia, and remained at Philadelphia until the year

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vote for a president; and that the first Wednesday in March next, be the time and the present seat of Congress the place for commencing proceedings under the said Constitution."

For text see 13 JOUR. OF THE UNITED STATES IN CONGRESS ASSEMBLED, containing the Proceedings from the 5th day of November, 1787, to the 3d Day of November, 1788, p. 141. Printed by John Dunlap, Philadelphia (1788). See also *ibid.*, p. 155, Oct. 2, 1788, letter from Mayor of New York regarding repairs on buildings where Congress is to assemble.

[20] See ANNALS OF CONGRESS (THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES), compiled from authentic materials by Joseph Gales, Sr., Wash., printed and published by Gales and Seaton, 1834.

Vol. 1, pp. 15–16: Proceedings of the Senate of the United States, First Session of the First Congress.

> "Wednesday, March 4, 1789,
>
> The members present not being a quorum, they adjourned from day to day, until
>
> Wednesday, March 11,
>
> When the same members being present as on the 4th instant, it was agreed that a circular should be written to the absent members, requesting their immediate attendance."

There were meetings March 12, 18, 19, 20, 21 and 28, but there was no quorum until Monday, April 6.

[21] 1 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 57, *et seq.*

[22] *Ibid.*, I, 62, 63.

[23] See Reply to the Senate, dated "City of Washington, November 26, 1800," *ibid.*, I, 309.

[24] An act for establishing the temporary and permanent seat of the Government of the United States, 1 STAT. AT L., 130.

1800 when it was established in the City of Washington,[25] and has there remained continuously ever since,[26] with the exception, if it may be called an exception, of the brief period of British occupation during the war of 1812.[27]

That the President should reside at the seat of government has always been assumed, and the first statute providing for the salary of the President,[28] allowed to him "the use of the furniture and other effects now in his possession belonging to the United States;" and since the seat of Government has been permanently established at Washington, an official residence has been there provided for the President.[29]

But neither the fact of the establishment of the seat of government at Washington nor the official residence there of the President in any way limits his discretion as to the place where his functions as executive are to be performed.

From the time of President Washington it has been the constant practice of the executive to exercise his official functions while absent from the national capital.

In "Messages and Papers of the Presidents," [30] will be found a

"Memorandum of absences of the Presidents of the United States from the national capital during each of the several Administrations, and of public and executive acts performed during the time of such absences."

This memorandum covers the period up to the administration of President Buchanan and gives a very comprehensive statement of the very numerous official acts performed by various Presidents while absent from the seat of government.

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[25] See the message of President Adams of November 22, 1800, 1 RICHARDSON, *op. cit.*, 305.

[26] The act of February 25, 1799 provides that the President may direct the removal of any or all of the public offices from the seat of Government to some other place, in the event of epidemic, 1 STAT. AT L., 619, 620, 621.

[27] This occupation lasted only two days or so and no other place was set up as a temporary seat of the Government. See 1 BRYAN, HISTORY OF THE NATIONAL CAPITAL, 624–634.

[28] Act of September 24, 1789, 1 STAT. AT L., 72.

[29] See the act of July 16, 1790, *ibid.*, 130, and, as an instance of subsequent statutes, the appropriation "for furnishing the President's House," Act of April 20, 1818, 3 STAT. AT L., 458.

[30] Vol. 7, p. 364.

The occasion for the preparation of this memorandum, which was transmitted to the House of Representatives by President Grant, was the criticism and debate regarding the time spent by him at Long Branch, New Jersey, resulting in the passing of a resolution on the subject by the House of Representatives, which at that time had a Democratic majority.[31]

In the message of President Grant[32] transmitting the above memorandum particular mention is made of the fact that it was in direct reference to the Act of Congress of July 16, 1790,[33] that Washington on March 30, 1791, issued an executive proclamation from Georgetown, which as President Grant said, was "a place remote from Philadelphia, which was then the seat of Government."

Similarly, absence of the President from the United States in connection with the administration of civil affairs, is properly within his discretion and is not inconsistent with the performance of his executive functions. Recent precedents of great weight support this view. President Roosevelt visited the Canal Zone and Panama, as did President Taft, who also went across the border into Mexico.

"There is an impression that the President cannot leave the country and that the law forbids. This is not true. The only law which bears on the subject at all is the constitutional provision that the Vice-President shall take his place when the President is disabled from performing his duties. Now if he is out of the country at a point where he cannot discharge the necessary functions that are imposed upon him, such disability may arise, but the com-

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[31] The text of the resolution is as follows:

"RESOLVED, That the President of the United States be requested to inform this House, if, in his opinion, it is not incompatible with the public interest, whether since the 4th day of March, 1869, any executive acts, offices, or duties, and, if any, what, have been performed at a distance from the seat of Government established by law, and for how long a period at any one time, and in what part of the United States; also, whether any public necessity existed for such performance, and, if so, of what character, and how far the performance of such executive offices, acts, or duties at such distance from the seat of Government established by law was in compliance with the act of Congress of the 16th day of July, 1790." CONG. REC., 1st Sess., 44th Cong., vol. 4, part 3, 2158.

[32] For the text of the message see 7 RICHARDSON, *op. cit.*, 361.

[33] Quoted *supra*.

munication by telegraph, wireless and by telephone are now so good that it would be difficult for a President to go anywhere out of the country and not be able to keep his subordinates in constant information as to his whereabouts and his wishes. As a custom, Presidents do not leave the country. Occasionally it seems in the public interest that he should. President Roosevelt visited the Canal Zone for the purpose of seeing what work was being done there and giving zest to it by personal contact with those who were engaged in it. I did the same thing later on, traveling, as he did, on the deck of a government vessel, which is technically the soil of the United States, from Hampton Roads to the Canal Zone under the dominion of the United States. We were not out of the jurisdiction except for a few hours. He went into the City of Panama, as I did, and dined with the President of the Panamanian Republic. So, too, I dined with President Diaz at Juarez in Mexico, just across the border from El Paso. Nobody was heard to say that in any of these visits we had disabled ourselves from performing our constitutional and statutory functions." [34]

In the Constitutional Convention the powers of the Crown of Great Britain were clearly to some extent the basis of the powers of the President under the Constitution; [35] indeed the Supreme Court has held that it is proper to some extent to view the executive powers in the light of those powers of the Crown; [36] and it was doubtless well known to the members of the Convention, though not mentioned in the debates, that "any act of royal power" may lawfully be performed outside of the realm.[37]

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[34] TAFT, *op. cit.*, 50, 51.

[35] This statement may be regarded as a matter of inference rather than a matter of certitude; that the theory and practice of the government of Great Britain were constantly in the minds of the members of the Convention cannot be doubted. See 1 FARRAND, *op. cit.*, 65, 86–87, 92, 97, 98–99, 100–101, 107, 139, 288–293, 398.

[36] The cases of United States *v.* Wilson, 7 Pet. (U. S.), 150 (1833), and *Ex parte* Wells, 18 How., 307 (1855), support this principle.

[37] 2 WILL. AND MARY, c. 6, Twentieth Day of May, Anno. Dom. 1690.

"An Act for the Exercise of the government by Her Majesty during His Majesty's Absence:

"Nothing in this Act shall be taken or construed to exclude or debar His Majesty during such His Absence out of this Realm from the Exercise or Administration of any Act or Acts of Regal Power or Government within this Realm, the Kingdom of Ireland, or any other Their Majesties Dominions Whatsoever; But that all and every such Act and Acts shall be as good and

That the executive is the sole organ of intercourse with other nations is a principle which has been acted upon since the foundation of our Government.[38]

In vetoing two joint resolutions of Congress which purported to direct the Secretary of State to make certain communications to other countries, President Grant on January 26, 1877, used language which may be said to indicate the constant and now settled view of this question.

"The Constitution of the United States, following the established usage of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers and to receive all official communications from them." [39]

Before considering the treaty making power vested in the President, which is subject to the advice and consent of the Senate, it is to be pointed out that many agreements of various kinds are made by the executive with foreign powers which are not submitted to the Senate.

The agreements which the executive of the United States may make with foreign powers and which are not to be regarded as treaties requiring the advice and consent of the Senate, fall naturally into two general classes, (*a*) those that are made pursuant to or in furtherance of an act of Congress, and (*b*) those which rest on the power of the President alone.[40]

It is to be observed that the United States Constitution explicitly recognizes that a distinction exists between *treaties* and *agreements* with foreign powers which are not treaties. Article 1, section 10 of the Constitution provides that "no State shall enter into any *Treaty, Alliance or Confederation*,"

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effectual, as if His Majesty was within this Realm, and shall not be contradicted or controlled but by His Majesty only."

GREAT BRITAIN, SPECIAL ACTS of 1690, 93.

[38] See discussion by Hamilton, "Pacificus," No. 1, June 29, 1793. "In Defence of the Neutrality Proclamation of President Washington, April 22, 1793"; 3 WORKS OF ALEXANDER HAMILTON, 313; and for judicial authorities, see Marbury *v.* Madison, 1 Cranch (U. S.) 137, 166 (1803); Williams *v.* Suffolk Insurance Co., 13 Pet. (U. S.) 414, 420 (1839).

[39] For the full text of the message see 7 RICHARDSON, *op. cit.*, 430, 431, 432.

[40] CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS, 116 *et seq.*; J. B. Moore, "Treaties and Executive Agreements," 20 POL. SCI. QUARTERLY, 385–420.

(clause 1), and in clause 3 of the same section is found the language "No state shall *without the Consent of Congress* . . . enter into any Agreement or Compact . . . with a foreign power."

Thus there is a distinction between the *treaty, alliance or confederation* into which a State of the Union is absolutely prohibited from entering and an *agreement or compact* with a foreign power into which a State may enter with consent of Congress.[41]

Agreements made by the executive pursuant to or in furtherance of an act of Congress [42] have related to

(*a*) Navigation and Commerce,

(*b*) International copyright,

(*c*) Trade marks,

(*d*) International postal and money order regulations.

Such agreements have been sustained by the highest authority as not infringing upon the legislative or treaty making power.[43]

International agreements which rest on the executive power alone have in some instances related to matters of great importance.

The cession of Horseshoe Reef in the Niagara River to the United States was effected by an exchange of notes.[44]

The preliminary articles of peace with Spain were agreed to by the protocol of August 12, 1898, which was not submitted to the Senate, and which contained provisions for the relinquishment of the sovereignty of Spain over Cuba, for the cession to the United States of Porto Rico, and of an island in the Ladrones.[45]

Not only was the military expedition in China at the time of the Boxer Rebellion in 1900–1901 carried out under the executive direction and authority of President McKinley, but

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[41] The precise nature of this distinction has never been satisfactorily explained. It was discussed in the case of Holmes *v.* Jennison, 14 Pet. (U. S.), 540, 571 (1840), in an opinion written by Chief Justice Taney, in which three other Justices of the Supreme Court concurred.

[42] CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT, 2 ed., c. IX.

[43] Field *v.* Clark, 143 U. S., 649 (1892).

[44] 5 MOORE, DIGEST INT. LAW, 215.

[45] CRANDALL, *op. cit.*, 103, 104.

the final protocol of September 7, 1901, to which the United States was a party, was not submitted to the Senate.[46] This protocol provided, among other things, for the payment of an indemnity to the eleven powers, of which the United States was one.[47]

The final conclusion of a treaty between the United States and a foreign power requires, of course, the advice and consent of the Senate; but while the President may, and on various occasions has,[48] requested the advice of the Senate before the conclusion of his negotiations, he is under no obligation to do so. Negotiations with foreign governments are carried on exclusively by the executive, and the advice and consent of the Senate need not be asked, as indeed they are ordinarily not asked, until the negotiations of the executive are concluded and the proposed treaty resulting therefrom is laid before the Senate.

On February 15, 1816, the Senate Committee on Foreign Relations reported unfavorably a resolution recommending to the President that he further pursue negotiations for an additional treaty with Great Britain, using language, which, in view of the constitutional functions of the Senate, is of great importance:

"The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of

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[46] CRANDALL, *op. cit.*, 104.

[47] For the text see FOREIGN RELATIONS OF THE UNITED STATES, 1901, Appendix, Affairs in China, 306–318. This is in my opinion the most extreme instance in our history of an executive agreement with a foreign power. I have always wondered whether the situation created by the assassination of Mr. McKinley did not have some relation to the fact that the protocol was not submitted to the Senate. Mr. McKinley was shot on September 6, and died on September 14, 1901.

[48] FINLEY AND SANDERSON, THE AMERICAN EXECUTIVE AND EXECUTIVE METHODS, 280–282.

foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety." [49]

In the debate in the Senate in 1906 regarding the participation of the United States at the Algeciras conference concerning Morocco, it does not appear that the report of the Committee on Foreign Relations made in 1816 was alluded to, but views somewhat similar to those of that report were expressed by Mr. Spooner and Mr. Lodge.[50]

While negotiations by the President with the heads or representatives of foreign powers have been usually conducted by his agents, who ordinarily, in the case of a treaty, sign the same in the first instance, pursuant to powers given for that purpose, the negotiations on behalf of the United States are, in legal contemplation, those of the President,[51] who may, if he sees fit, conduct them personally, and who may, if he sees fit, sign the resulting agreement. Thus the agreement for the lease by the United States of certain lands for coaling and naval stations in Cuba (which was not submitted to the Senate), was signed by the President of Cuba, and by Theodore Roosevelt as President of the United States on February 23, 1903.[52]

Instances of personal negotiation and signature of treaties by foreign sovereigns are not unknown.[53]

The language of the Constitution referring to the President as Commander-in-Chief is as follows:

"The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." [54]

The questions here involved do not require any attempt at a comprehensive statement of the powers of the President as Commander-in-Chief.[55] It is sufficient to point out that they

[49] 8 REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, 24, 25 (1901).

[50] Speech of Senator Spooner, Jan. 23, 1906, CONG. RECORD, 59th Cong., 1st Sess., vol. 40, pt. 2, 1418, 1419. Speech of Senator Lodge, Jan. 24, 1906, *ibid.*, 1470.

[51] CRANDALL, *op. cit.*, 93 and notes.

[52] 1 MALLOY, TREATIES, 358, 359; CRANDALL, *op. cit.*, 93.

[53] CRANDALL, *op. cit.*, 1.

[54] U. S. CONSTITUTION, Article II, Section 2.

[55] A full discussion of the subject may be found in BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES, see particularly Chapters VII–IX incl.

undoubtedly include the right to be present with, and to take command in person of, the forces of the United States.[56]

This was the view taken by President Washington at the time of the Pennsylvania insurrection in 1794, when he assumed active command of the militia of four states, which were called into the actual service of the United States.

"As commander-in-chief of the militia when called into the actual service of the United States, I have visited the places of general rendezvous to obtain more exact information and to direct a plan for ulterior movements." [57]

President Lincoln's views on his powers as Commander-in-Chief were expressed both before and after the issuance of the Emancipation Proclamation.

"Now, then, tell me, if you please, what possible result of good would follow the issuing of such a proclamation as you desire? Understand, I raise no objections against it on legal or constitutional grounds; for, as commander-in-chief of the army and navy, in time of war I suppose I have a right to take any measures which may best subdue the enemy." [58]

"You dislike the Emancipation Proclamation, and perhaps would have it retracted. You say it is unconstitutional. I think differently. I think the Constitution invests its commander-in-chief with the law of war in time of war." [59]

President Grant in his message to the House of Representatives of May 3, 1876, *supra*, used the following language:

"His (the President's) civil powers are no more limited or capable of limitation as to the place where they shall be exercised than are those which he might be required to discharge in his capacity of Commander-in-Chief of the Army and Navy, which latter powers, it is evident, he might be called upon to exercise possibly even without the limits of the United States." [60]

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[56] See BERDAHL, *op. cit.*, 118 *et seq.* and the authorities there cited.

[57] Washington, "Address to Congress," Nov. 19, 1794. 1 RICHARDSON, *op. cit.*, 164–165.

[58] Lincoln, "Reply to a Committee from the Religious Denominations of Chicago, asking the President to issue a Proclamation of Emancipation," Sept. 13, 1862. 6 WRITINGS OF ABRAHAM LINCOLN, ed. by A. B. Lapsley, 138.

[59] Lincoln, Letter to James C. Conkling, Aug. 26, 1863, *ibid.*, VI, p. 392.

[60] CONG. RECORD, 1st Sess. 44th Cong. Vol. 4, pt. 3, 2999.

The functions of the President as Commander-in-Chief are not limited to times of war, but the status of war, of course, enormously increases his responsibilities as such.[61]

That the acts of President McKinley in his government of the Philippines were acts as Commander-in-Chief, was recognized by Congress.[62]

The functions of the President which from the argument of convenience would appear most naturally to require his presence at or near the seat of Government, are those which he exercises in the approval or veto of bills (and resolutions) passed by Congress.

The constitutional provisions on this subject are set forth below.[63]

The functions of the President, in respect of a bill (including resolutions in the term) commence upon its presentation to him, which occurs usually within a day or two or at most a few days, after its passage by both Houses of Congress, but within no definitely fixed interval of time thereafter prescribed either by enactment or by custom.

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[61] TAFT, *op. cit.*, 98, 99. See generally BERDAHL, *op. cit.*, for a complete discussion of this point.

[62] Act of July 1, 1902, 32 STAT AT L., 692.

[63] "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

"Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." UNITED STATES CONSTITUTION, Article I, Section 7.

The first Congress of the United States met on March 4, 1789, although a quorum of neither the Senate nor the House of Representatives was present on that day. The first bill passed by the House of Representatives was passed on April 27, three days, it may be observed, before President Washington was first inaugurated. This was a bill to regulate the time and manner of administering oaths, and subsequently became the first statute to take effect under the Constitution. On May 5th this bill was passed by the Senate with amendments, and on May 6th these amendments were agreed to by the House of Representatives with a further amendment. On May 7th the last mentioned amendment was agreed to by the Senate, thus passing the bill, for a complete agreement had been reached between the two Houses. On May 22 the bill was presented to the President, who approved it on June 1st.[64]

Subsequently in the same session joint rules were adopted by the House of Representatives on July 27[65] and by the Senate on August 6,[66] the language of these rules being as follows:

"After a bill shall have passed both Houses, it shall be duly enrolled on parchment, by the Clerk of the House of Representatives, or the Secretary of the Senate, as the bill may have originated in the one or the other House, before it shall be presented to the President of the United States.

"When bills are enrolled, they shall be examined by a joint committee of one from the Senate, and two from the House of Representatives, appointed as a standing committee for that purpose, who shall carefully compare the enrolled with the engrossed bills, as passed in the two Houses, and, correcting any errors that may be discovered in the enrolled bills, make their report forthwith to the respective Houses.

"After examination and report, each bill shall be signed in the respective Houses, first by the Speaker of the House of Representatives, and then by the President of the Senate.

"After a bill shall have thus been signed in each House, it shall be presented, by the said committee, to the President of the United States for his approbation; it being first endorsed on the back of

[64] 1 ANNALS OF CONGRESS, 15, 25, 31, 32, 33, 39, 95, 207, 271. 1 STAT. AT L., 23, 24.

[65] 1 ANNALS OF CONGRESS, 671, 672.

[66] *Ibid.*, I, 57, 58.

the roll, certifying in which House the same originated; which endorsement shall be signed by the Secretary or Clerk, as the case may be, of the House in which the same did originate, and shall be entered on the journal of each House. The said committee shall report the day of presentation to the President, which time shall also be carefully entered on the Journal of each House.

"All orders, resolutions and votes, which are to be presented to the President of the United States for his approbation, shall also, in the same manner, be previously enrolled, examined, and signed, and shall be presented in the same manner, and by the same committee, as provided in case of bills."

These rules in substance continued to be in force, being adopted by each successive Congress, until 1876, when the dispute over the Hayes-Tilden election in that year prevented the adoption by the two Houses of any joint rules whatever. The practice established by them, however, has been continued; and in effect the general rules were re-adopted by a concurrent resolution of the two Houses of Congress, dated November 1, 1893, which provided for the printing instead of the engrossing of bills, but otherwise continued the practice in force.

"RESOLVED, That when such bill or joint resolution shall have passed both Houses, it shall be printed on parchment, which print shall be in lieu of what is now known as, and shall be called, the enrolled bill, or joint resolution, as the case may be, and shall be dealt with in the same manner in which enrolled bills and joint resolutions are now dealt with." [67]

This concurrent resolution received statutory approval by the act of March 2, 1895.[68]

Thus the "enrolled bill" is printed after the "bill" has passed both Houses and it is this "enrolled bill" which is presented to the President.[69]

And it is the time at which the bill is *presented* to the President from which are dated the constitutional limitations,

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[67] Extract from CONG. RECORD, 53d Cong., 1st Sess. vol. 25, pt. 3, 3039.

[68] 28 STAT. AT L., 769.

[69] For a fuller account of the practice, see 4 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §§ 3429–3440.

and this time of *presentation*, while subsequent to the time of the passage of the bill, is not subsequent thereto by any definite, necessary or prescribed period.

Upon the presentation of a bill to the President, three courses are open to him. He may approve the bill and sign it; he may return it, with his objections, to the House of Congress in which it originated; or he may neither approve nor return "within Ten days (Sunday excepted) after it shall have been presented to him."

This period of ten week-days, or in other words, of either eleven or twelve calendar days, thus becomes a time limit for either approval or return, for after its expiration, approval is unnecessary and return impossible.

The end of a session of Congress presents special difficulties hereafter considered, but when the session of Congress *continues* after the passage of the bill and after its presentation to the President, it could in no case make any difference whether the President was at the seat of Government or elsewhere, except when he desired to *return*, that is, to veto the bill; for the interval required between the time of passage and of presentation is not material; and if, within the eleven or twelve calendar days *after presentation*, the President neither approved and signed the bill nor wished to return it, it would be a law, regardless of whether he had received it at the White House or at the Capitol or elsewhere.

It may be assumed that the "return" of the bill, as used in the Constitution, means not merely the sending of the bill back to the Senate or to the House of Representatives by the President, but also the completed result of that sending, that is, the delivery of the bill to the House in which it originated. In passing, it may be said that the point has never been adjudged and that an argument of some force might be made to the contrary.[70]

However, the delivery of the bill to the Senate or to the House of Representatives may doubtless be a delivery to its officer, during a recess in a session or after adjournment for the day.

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[70] See 1 WATSON, THE CONSTITUTION, 364, 365.

For example, suppose a bill be presented to the President on Saturday, February first. The "ten days (Sundays excepted)" would, by well settled rules, exclude the day of presentation and would also exclude Sunday, February second and Sunday, February ninth, so that the last day for a veto (or for approval and signing) would be Thursday, February thirteenth. The whole of the day would be available to the President and clearly a delivery of the bill by midnight of that day to the proper officer would be good. This was impliedly adjudged in *La Abra Co.* v. *United States*,[71] which expressly held that a Presidential approval on December 28 of a bill presented to him on December 20 was valid, though both Houses of Congress were in recess from December 22 until the following January 4.[72]

Under modern conditions of travel, a messenger could as readily and perhaps more surely reach Washington in eleven days from a point in Central Europe, than from Boston in the winter in 1800; and in such case no physical difficulties would exist which would prevent the President, while in Europe, from approving or vetoing bills within the constitutional period, during the continuance of a session of Congress.[73]

Special circumstances exist, however, at and near the closing of a session of Congress. In the odd numbered years, the so-called short session ends by operation of law on March 4 by reason of the fact that the terms of all members of the House of Representatives expire on that day.

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[71] 175 U. S. 423 (1899).

[72] The opinion of Attorney-General, W. H. H. Miller, dated December 28, 1892, 20 Opinions of the Atty.-Genl., 503, was occasioned by the same recess of Congress considered by the court in the La Abra case, *supra*. The opinion is quite uncertain and hesitating in tone and concludes as follows:

"Upon the whole I advise that bills coming to you during the recess of Congress, or within ten days prior thereto be signed or vetoed as they meet your approval or disapproval, the bill, in case of veto, being returned when Congress reconvenes, and allow any questions as to their validity to be settled in court."

This conclusion, in its failure to recognize that the veto and the return of a bill by the President are not two different things, but simply the popular and the constitutional names for the same thing, is so extraordinary as to require no comment.

[73] The Royal assent to bills passed by Parliament may be and sometimes is given outside of British territory. MAY, PARLIAMENTARY PRACTICE, 12 ed., 396.

The veto power of the President during eleven [74] days ending with the last day of a session of Congress is greater than at any other period, for it is absolute so far as that session of Congress is concerned. The President may prevent the taking effect as law of any bill presented to him during the period mentioned, simply by failing to approve and sign it; for by the express provision of the Constitution, the adjournment of Congress, by cutting short the time within which the President may return the bill with his objections, is said to prevent its return, and in such case the bill does not become a law; Congress has no opportunity ever of attempting to pass the bill over the President's veto, for there has been no veto in the strict sense, but what is popularly called a pocket veto.

On the other hand, it has been very generally thought that the President has no power *after* the adjournment of Congress to approve and sign a bill and thus make it a law. This is the view of Mr. Taft.[75]

It seems to me that this view is erroneous. On March 12, 1863, eight days after the adjournment of the short session of Congress, President Lincoln signed the act known as the "Abandoned and Captured Property Act." [76] At the first session of the next Congress, the committee on the Judiciary in the House of Representatives in a unanimous report expressed the opinion that the act of March 12, 1863, "is not in force." [77] At the same session in Congress, however, was passed a statute [78] which referred to the "Abandoned and Captured Property Act," adding to its provisions and enacting new legislation.[79]

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[74] In some years the period is twelve days.

[75] TAFT, *op. cit.*, 24.

[76] 12 STAT. AT L., 820.

[77] H. R., No. 108, First Sess. 38th Cong.

[78] Act of July 2, 1864, 13 STAT. AT L., 375.

[79] Mr. Taft says, *op. cit.*, 24, that "a new bill of substantially the same purport" as the act of March 12, 1863, "passed both Houses and was signed by the President"; presumably the reference is to the act of July 2, 1864. A comparison of the two statutes shows that the act of 1864 (§ 1) added to the provisions of § 2 of the act of 1863, extended (§ 3) the provisions of § 1 of the act of 1863, amended (§ 3) § 6 of the Act of 1863, repealed (§ 6) § 4 of the act of 1863, and otherwise recognized (§ 7) the act of 1863.

Furthermore, the act of March 12, 1863,[80] gave jurisdiction to the Court of Claims in certain cases thereunder, and in an application for a *mandamus* to allow an appeal in one of such cases, the Supreme Court, while not mentioning the question of constitutionality, did mention that the statute of 1863 was passed by Congress on March 3, and was signed by the President nine days later on March 12.[81] The opinion was written when the Chief Justice of the Court was Salmon P. Chase, who had been Secretary of the Treasury under President Lincoln at the time of the approval of the act.

Indeed, in an opinion written by Chief Justice Chase in 1865 regarding certain property claimed as maritime prize, the Court decided against the contention of the government that the property was prize, and against the contention of the claimant that it should be turned over to her, and directed that the proceeds should be paid into the Treasury of the United States in order that the claimant might bring suit *under the act of 1863*.[82]

It is true that until 1920 the instance of the act of 1863 was the only instance where a President, after the adjournment of Congress for that session, has signed a bill presented to him during the session at which it was passed.[83] But power granted by the Constitution is not lost by failure to use it.

The constitutional provisions divide bills presented to the President into two general classes, the first class being those that are approved and signed by him, the second class being those that are not so approved and signed.

When a bill is presented to the President, the possibility exists

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[80] For a somewhat elaborate history of this statute of 1863 and of the proceedings thereunder, see 18 Ct. of Cl. Rep. 700 *et seq.* (1883) and 29 Ct. of Cl. Rep. 523 *et seq.* (1894).

[81] *Ex parte* Zellner, 9 Wall. (U. S.), 244, 245 (1869).

[82] Mrs. Alexander's Cotton, 2 Wall. (U. S.), 404–423 (1864).

[83] The second session of the 66th Congress ended by adjournment on June 5, 1920. Eight bills passed by Congress and presented to President Wilson during the session were signed by him after its adjournment, one on June 10, 1920, and seven on June 14, 1920. These are chapters 285–292 inclusive of the laws of that year and are printed in 41 STAT. AT L. 1063–1079, 1522; see 32 Opinions of the Atty. Genl. 225. For an elaborate discussion of the subject see an article in 30 YALE L. J. 1 (November, 1920) by Professor Lindsay Rogers, "The Power of the President to Sign Bills after Congress has Adjourned.

that it will become a bill of either class. It can become a bill of the first class only by the affirmative act of the President, his approval evidenced by his signature. In the absence of this affirmative act, the bill automatically falls into the second class of those not approved and signed by the President, and this occurs *either* when the President performs the affirmative act of returning the bill with his objections, *or* by the lapse of the time prescribed in the Constitution.

The provision that a bill not returned by the President within the constitutional period shall become a law if Congress has not adjourned, and shall not become a law if Congress has adjourned relates solely to the second general class of bills, that is, bills which the President has not signed and approved, for it is only such bills that can be returned, whether Congress is in session or not. This is obviously the case, because while the language of the Constitution is general in speaking of "any bill not returned by the President," the generality of the expression is not literally intended, for in a literal sense a bill which the President signs and approves is a bill which is not returned, but which on the contrary is deposited with the Secretary of State as a law.

In addition to the cases above cited on the Act of March 12, 1863, various other decisions tend to support the views which I have expressed.[84]

As pointed out, however, the practice has been for the President not to sign, after the adjournment of a session of Congress, any bills presented to him during that session. In accordance with this practice, in recent years the President has usually gone to the Capitol, on the last day of the session of Congress, in order that he may there have presented to him and may sign any bills passed late in the session, which he approves.

Under this practice any distance whatever by which the President is distant from the Capitol, limits the power of the President to approve, during a session of Congress, bills passed during the last portion of the session. For example, if the President were at New York, no bills passed by Congress

[84] Seven Hickory *v.* Ellery, 103 U. S. 423 (1880); The People *v.* Bowen, 21 N. Y. 517 (1860); State, *ex rel.* Belden, Atty. Gen. *v.* Fagan, 22 La. Ann. 545 (1870); Solomon *v.* Commissioners of Carterville, 41 Ga. 157 (1870).

within a few hours before adjournment could be presented to or signed by the President during that session, and the same would be true of a correspondingly greater period of time if the President's duties required him to be at Chicago or on the Pacific Coast. Such results are indeed in themselves a strong argument in favor of the view that the President may approve and sign bills *after* the adjournment of the Congress which passed them, whether presented to him during the continuance of the session or not; for as has been seen, it has been contemplated from the earliest days of the Republic that the President's duties might not only permit, but imperatively require, that he should be absent from the seat of government.

In any event it is necessary to make one broad qualification of the general statement frequently made that the President does not sign bills passed by Congress after the adjournment of the session at which the bills were passed. This qualification results from the highly important fact to which allusion has been made, that the period from which the constitutional limitations date is the *presentation* of the bill to the President and not its passage. It has been the practice that bills passed by both Houses of Congress at a particular session, and not presented to the President during that session, may be presented to him at a subsequent session of Congress, and that upon their approval by the President at such subsequent session the bills become law.

This practice has been followed in cases where the bill had been enrolled and signed by the presiding officers of the two Houses at the earlier session and also in cases where the bill, though passed, had not been enrolled.[85]

It is thus evident, as a practical matter, that under any view, if the President were absent from the seat of government at the close of a short session of Congress, for example, so that bills passed by that session of Congress could not during its continuance be presented to him, an extra session of Congress called to sit immediately thereafter could continue in session for a sufficiently long period to permit the presentation to the President for his approval, or his veto, of the bills passed at the

[85] 4 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §§ 3486–3488.

previous session. Accordingly bills presented to the President at a distance from the Capitol during or even subsequent to the closing days of a session might be approved and signed by him or fail for lack of such approval, precisely as if he were at the seat of government.

Thus it appears that the functions of the President under the Constitution require the exercise of executive discretion; that the executive powers may be and have always been deemed to be exercisable away from the seat of government, and that their exercise is not inconsistent with the absence of the President in a foreign jurisdiction; that the functions of the President as the organ of intercourse with other nations generally and particularly in the negotiation of executive agreements and of treaties, are not subject to Congressional control or limitation, and are exercisable by him either personally or, at his discretion, by such agents as he may select; that his functions as Commander-in-Chief not only permit, but may indeed require, his absence from the seat of government and, in his discretion, his presence with the forces of the United States whether taking personal command of them or not, and whether those forces are within or without the United States; and that his functions in connection with legislation, whether deemed to be executive or legislative, may well be performed away from the seat of Government where Congress sits.

The Peace Conference of 1919 was of necessity required to meet in Europe. Under the circumstances stated the United States was at war and had some millions of its troops in Europe and a large part of its Navy in European waters; and the war could in no sense be considered as ended until, at the earliest, the signature of a Treaty of Peace.

Under these circumstances, and taking into view the functions of the President under the Constitution of the United States which have been mentioned, there can be no doubt that the question whether the President should or should not attend such a Peace Conference, some of the contemplated results of which were to bring the war to a close, and to permit the repatriation of two million American troops abroad, was a question to be determined under the Constitution exclusively by the discretion of the President himself.

As in the exercise of that discretion President Wilson determined that in the interests of the United States, his presence at the Peace Conference, as the Executive and Commander-in-Chief of the forces of the United States, was advisable, such presence was clearly within his functions, powers and duties under the Constitution of the United States.

The conclusions reached render unnecessary any more than brief reference to the suggestions at one time made that the powers and duties of the President or some of them might devolve upon the Vice President during the presence of the former in Europe.

The relevant provision of the Constitution regarding the Vice President is found in Article II, Section 1.[86]

Under the Constitution, the functions of the President are single and indivisible in the sense that they are all to be performed by one Executive. As has been shown, the performance of these functions by the President is within his discretion, as to time, manner, method and place; and if he deems it advisable that certain of these functions should be performed in a particular place, necessarily the other functions with which he is clothed are to be performed in that place, according to the circumstances of the case, as the convenience and the discretion of the executive may require.

As it appears that the presence of the President at the Peace Conference in Paris was in performance and in discharge of his powers and duties under the Constitution of the United States, it obviously and necessarily follows that such performance and discharge by the President of these duties could not at the same time constitute an "inability" of the President "to discharge the Powers and Duties of the said Office." [87]

David Hunter Miller.

NEW YORK CITY.

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[86] *Supra*, note 6.

[87] See the proposal of Hamilton in 5 ELLIOT'S DEBATES, 587, cited in BERDAHL, *op. cit.*, 239.